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IN THE

Supreme Court of the United States

October Term, 1962

No. 953

JAMES NORMAN YELOUSHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES B. McDONOUGH, JR.
601 Exchange National Bank Building
Tampa, Florida

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James Norman Yeloushan, your petitioner, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, (A) holding that it did not reach nor decide a novel and important question in the administration of the Federal criminal law, to-wit, whether Rule 20 of the Federal Rules of Criminal Procedure confers upon a transferee court otherwise without jurisdiction, at the instance of one only of two jointly indicted defendants, the power to sever the proceedings as to the other joint defendant, the Petitioner here, in the absence of any action by the Court of the indictment and without the consent of the Petitioner, and (B) dismissing as

interlocutory, not appealable, and not within the recognized exception to the final judgment rule, the petitioner's consolidated appeals from three orders of the Court of the indictment which taken together answered the above question in the affirmative, and refused to order the rearrest of the Petitioner's codefendant for arraignment before and plea to the Court of the indictment.

OPINIONS BELOW

The opinion of the Court of Appeals is dated February 6, 1963, and petition for rehearing was timely filed and denied on March 1, 1963. The opinion has not been officially reported and a copy is appended as Appendix A, and a copy of the formal judgment is appended as Appendix B. There was no opinion accompanying the denial of rehearing but a copy of the order denying rehearing is appended as Appendix C. Motion in the Court of Appeals to stay proceedings in the District Court was likewise denied on March 1, 1963, and copy of that order is appended as Appendix D. The orders of the District Court were without accompanying opinions.

JURISDICTION

The opinion and judgment of the Court of Appeals sought to be reviewed are dated February 6, 1963. Petition for rehearing was timely filed and denied by order dated March 1, 1963. The jurisdiction of this Court is invoked under the provisions of 28 USCA Section 1254 (1).

Petitioner respectfully submits that the Court of Appeals notwithstanding its disclaimer has in fact erroneously decided an important question in the ad-

ministration of the Federal criminal law, arising under Rule 20 of the Federal Rules of Criminal Procedure, which has not been but should be settled by this Court. Prior to the instant decision of the Court of Appeals the only reported multi-defendant decisions involving Rule 20 were outspokenly in support of the Petitioner's claim of constitutional right.

Petitioner further respectfully submits that his constitutional right respecting the situs of all proceedings against him is absolute, does not owe its existence to proof he is damaged by its deprivation, and that the deprivation of that right here is unreviewable if review is put off until appeal from the judgment of conviction. The error would not affect the competency of the witnesses against him or in any other manner warrant or require reversal of a judgment of conviction. The recognized exception to the final judgment rule is where the error unreviewed before judgment is definitive and complete. Consequently, if the Court of Appels did not, in fact, reach and decide the constitutional question, its failure to do so at this time so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

QUESTIONS PRESENTED

1. (a) Whether the Court of Appeals did in fact decide that Rule 20 of the Federal Rules of Criminal Procedure conferred upon a transferee court otherwise without jurisdiction, at the instance of one only of two jointly indicted defendants, the power to sever the proceedings as to the other joint defendant, the Petitioner here, in the absence of any action by the Court of the indictment and without the consent of the Petitioner, and (b) whether that decision of the Court of Appeals was in error.

2. (a) Whether the Court of the indictment was in error in refusing to treat the proceedings in the transferee court as *coram non judice* and void, and in refusing to order the rearrest for arraignment before and plea to it of Petitioner's codefendant who sought to plead guilty before and accept sentence and probation by the transferee court, (b) whether that error of the Court of the indictment if not reviewed before appeal from a judgment of conviction would be definitive and complete, and thus reviewable even though interlocutory, under the recognized exception to the final judgment rule, and (c) whether the Court of Appeals was in error in dismissing the appeals.

STATUTES OR REGULATIONS INVOLVED

The case involves Rule 20 of the Federal Rules of Criminal Procedure (Title 18 United States Code, Rules 1 to 31 inclusive, in which Rule 20 is found on pages 409 and 410). The rule is not lengthy and the text is here set out verbatim, to-wit:

> "Rule 20. Transfer from the District for Plea and Sentence
>
> A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending

shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made."

STATEMENT

Gene N. Estes, a native of Midland, Texas, thirty-six years old at the time, an accountant by profession, a graduate of the high school at Midland, with service in the United States Navy, and a former student of business administration at Hardin-Simmons College at Abilene, Texas, came to Tampa in the early part of 1960 with his wife and four children, and agreed to purchase the petitioner's lakefront home for which the petitioner required a down payment of $3,000.00.

Petitioner was a responsible supervisory employee of a small loan company in Tampa, Florida, where he lived, himself having a wife and three children, and wanting to sell his home in order to purchase a better one.

According to Petitioner's statement to the Federal Bureau of Investigation Estes told the Petitioner that he had the money to make the required down payment but would prefer to use it to make some improvements on the house but the Petitioner told him that he would insist upon the $3,000.00 cash payment, although he pointed out to Estes that after the house had been purchased the latter could get a home improvement loan for any improvements he desired to make.

According to Estes, he told the petitioner that he did not have the $3,000.00 for the cash payment, and that the Petitioner suggested that he get the cash for the down payment by making a home improvement loan.

According to Mrs. Estes, who stood up with her husband before Judge R. E. Thomason in El Paso, Texas, she was the cause of it, as her husband "sure didn't want to do it". (Page 18, of the Transcript of the proceedings before Judge Thomason).

Prior to the closing of the purchase of the house Estes and his wife signed an application to the First Federal Savings and Loan Association of Tampa, Florida,, requesting a net loan of exactly $3,000.00 which required a gross loan of $3,715.17 which was made.

The Petitioner did not sign the application, but when, in December of 1960, Estes returned to his home in Midland, Texas, and defaulted on the loan, Estes and the Petitioner were, in November of 1961, jointly indicted in the United States District Court for the then Southern District of Florida, the only place where the alleged offense was committed, under Sections 2 and 1010, Title 18, United States Code. A copy of the indictment is appended as Appendix E, and those sections of Title 18 as Appendix F.

At the closing of the purchase of Petitioner's house Estes tendered the $3,000.00 check of the First Federal Savings and Loan Association, endorsed in blank as and for the down payment, and Petitioner accepted it. The verbatim statement which Petitioner gave the agents of the Federal Bureau of Investigation appears on page 13 of the transcript of the proceedings before the District Court in Florida on March 27, 1962, as follows:

> "At the time of the closing of the sale of the house Mr. Estes presented to me a check in the amount of $3,000.00 which was the amount of the down payment. This check was the check made payable to the Estes by the First Federal Savings and Loan Association of Tampa. I asked him at the time to give me his own personal check, but he did not have a check with him and stated it would not make any difference. I then accepted the check as down payment on the house. I did not contract and make any improvements on this house."

It appears from page 14 of the transcript of the proceedings before the District Court in Texas, on February 16, 1962, that Estes did make some of the improvements before his default and return to Texas in December of 1960, but the crucial fact here is that the United States is endeavoring to convict Petitioner as a principal under Section 2 of Title 18, United States Code, although the District Court refused to require the United States to specify whether Petitioner was being prosecuted under paragraph (a) or paragraph (b) of Section 2.

Even Fagin would be entitled to know whether he was being tried under paragraph (a) or paragraph (b) of Section 2 for those paragraphs specify different offenses and the general reference to Section 2 is insufficient (*Wright v. United States*, 243 F 2d 546 (CA 6th, 1957), *United States v. Inciso*, 292 F 2d 374 (CA 7th, 1961) and *Clark v. United States*, 293 F 2d 45 (CA 5th, 1961)), but the erroneous rulings of the District Court in Florida with respect to the sufficiency of the indictment are subject to effective review upon appeal from a judgment of conviction, and are of no concern here. The concern here is with respect to the deprivation of a constitutional right that is complete unless the claim is reviewed before judgment of conviction.

The indictment here was returned on November 21, 1961, and both defendants were arrested shortly thereafter, Petitioner in Florida and Estes in Texas, and arraignment was scheduled for January 5, 1962.

On December 19, 1961, Estes' counsel in Texas, a former United States Attorney at El Paso, telephoned the United States' Attorney's office in Tampa and received assurance that the latter would consent to a transfer under Rule 20 as to Estes only. No such consent had been signed or filed on January 5, 1962, the date of the arraignment. At that time Petitioner appeared and pleaded not guilty and his counsel was given 30 days for motions. Estes did not appear and the Assistant United States' attorney did not inform either the court or petitioner's counsel that his office had agreed to consent to a transfer under Rule 20 as to Estes. The consent itself is dated January 8, 1962, presumably the date it was signed by Estes. It was filed January 15, 1962, in the United States District Court for the Southern District of Florida, and it was filed on January 20, 1962, in the United States District Court for the Western District of Texas. Petitioner's counsel discovered these facts in a routine examination of the court file, on January 25, 1962, at which time he made an oral application to one of the United States District Judges in Tampa that the consent of the United States Attorney for the Southern District of Florida be required to be withdrawn and was given leave to file a formal motion for that relief. On January 26, 1962, Petitioner's counsel wrote the United States' attorney at El Paso requesting that Estes be not arraigned for plea and sentence in that court before the formal motion in the Florida Court to require the withdrawal of the consent had been heard and decided.

Under date of February 12, 1962, the Assistant United States Attorney at El Paso wrote Petitioner's counsel that Estes would not be arraigned until after the determination of the motions pending in Florida. A copy of that letter was sent to Estes' counsel who immediately arranged with District Judge R. E. Thomason at El Paso to have Estes arraigned and sentenced on February 16, 1962. Late in the afternoon of February 14, 1962, the Assistant United States Attorney at El Paso advised petitioner's counsel of those facts over the telephone. On February 15, 1962, Petitioner's counsel addressed a long telegram to Judge Thomason, which is printed as Appendix G hereto. Judge Thomason received and filed that telegram but refused to accede to its request.

After ordering the telegram filed, and hearing discussion by counsel as to the effectiveness of Rule 20 under such circumstances, the following appears on page 11 of the transcript of the proceedings before Judge Thomason:

> "'Now, you say this defendant lives in Midland, Texas, which is some fifteen hundred or more miles from Tampa, Florida, and has expressed a desire to plead guilty, so it seems to the Court that where the District Attorney in Florida has consented and sent the papers here, there is nothing this Court can do except to accept his plea. Of course, the Government or the defendant, either one, can still require his presence in Florida as a witness, but as for himself, in his own case, if he pleads guilty and throws himself upon the mercy of the Court that has jurisdiction, I don't know what more can be expected of him here or anywhere else. The Court holds that the proceedings are in compliance with Rule 20, that the papers are all here, that this Court has acquired jurisdiction, and gives his consent for the defendant to be arraigned and enter his plea here."

At the conclusion of the hearing before Judge Thomason the transcript on pages 17 and 18 reflects the following:

"MR. FULLER: I will say this, I have talked to Mr. Estes, he realizes he has done wrong, there is at present an outstanding charge on another man and that Mr. Estes feels and sincerely believes that while he should have known better yet another person provided the way for him to do this and reaped the rewards, and Mr. Estes has expressed the desire to go back there, if necessary, and merely tell what happened.

"THE COURT: Well, the Court has nothing to do with the other co-defendant and is making no comment and has no opinion about that. Of course, you know, as an able and experienced lawyer, that he will be available as a witness by either side, if they comply with the rules and force his attendance. I am sure if the defendant is called to Florida as a witness he will tell the truth about it regardless of what the effect may be. Would you like to say anything for yourself, Mr. Estes?

"THE DEFENDANT: There was no motive for personal gain in this, it was just done for the purpose of securing a house for my family. I had no selfish motives or criminal motives in the sense of stealing something or anything of that intent, that is all.

"THE COURT: You were down in great booming Florida and you wanted a home?

"THE DEFENDANT: Well, I actually did not want the home.

"THE COURT: Well, anyway - - -

"MRS. ESTES: I was the cause of it.

"THE COURT: Would you like to say something?

"MRS. ESTES: It was more my fault than his because he sure didn't want to do it.

"THE COURT: Well, anyway, we are all under the influence of our fine wives, sometimes, we all make mistakes, it is the judgment of the Court that you be and you are sentenced to confinement for two years, but in view of your statements and your past good record, and the facts in this case, that judgment and sentence is suspended for two years and you are placed on probation for two years. You will have to see the Probation Officer for the terms of your probation. The Court is adjourned."

Those proceedings before the District Court in Texas took place on February 16, 1962. When the motion to require the United States Attorney in Florida to withdraw his consent came on for hearing on February 26, 1962, it was denied on the ground that it was too late. (Proceedings before Judge Lieb, February 26, 1962, p. 5 and 6):

"MR. McDONOUGH: Your Honor, may I recite the chronology of this situation?

THE COURT: Has the man pleaded guilty already out there?

MR. McDONOUGH: Yes, Your Honor.

THE COURT: It has already been done.

MR. McDONOUGH: Yes, Your Honor. A week ago yesterday, over my violent protest, and I desire respectfully to show the circumstances under which that was done, over my personal request to the United States District Judge out there, of which I have a copy.

THE COURT: Now, Mr. McDonough, the question takes on different hue here. The Court in Texas has taken over the case of Mr. Estes and has apparently sentenced him; is that what you are telling me:

MR. McDONOUGH: That is correct.

THE COURT: It is a concluded act. I don't see anyway I can do anything about this now. I thought perhaps there was some time left during which for some reason, some reason that may be proper, I could inject myself into the matter. But I don't think I can now. It is concluded."

That motion, along with several others, was denied by order dated February 27, 1962. The motion to dismiss the indictment was denied by separate order dated February 28, 1962. Timely appeals were taken from those orders and a further motion was made in the alternative on the ground that as the proceedings in Texas were absolutely void either the indictment against the Petitioner must be dismissed or the court must order the rearrest of Estes for arraignment before and plea to the Florida Court.

The last motion was denied in all respects by order dated March 28, 1962, from which a separate and timely appeal was taken. By order of the Court of Appeals dated May 15, 1962, the three appeals were consolidated and heard upon a typewritten record.

ARGUMENT

POINT I

THE COURT OF APPEALS REACHED AND ERRONEOUSLY DECIDED THE QUESTION PRESENTED WITH RESPECT TO RULE 20 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Notwithstanding the disclaimer in the next to the last paragraph of the opinion of the Court of Appeals, its actual decision that Rule 20 did confer jurisdiction upon the District Court of Texas over the Petitioner and to sever the proceedings against the Petitioner is contained in the following paragraph of the opinion, which is here quoted in full except for the last sentence of that paragraph:

> "It is clear, however, from the record that the proceedings against Estes were terminated by the District Court for the Western District of Texas when sentence was imposed on February 16, 1962. Therefore, when the matter was brought before the district court in Florida upon motion on March 27, 1962, the question was moot and the court was not in error in treating the motion as an additional ground to dismiss the indictment yet pending against appellant. There was no indictment pending against Estes in any United States District Court and there simply was nothing upon which a warrant of arrest of Estes could be predicated."

The last sentence of that paragraph, omitted from the above quotation, was that, "The order of March 28, 1962, was clearly interlocutory and not appealable," which would appear to be something of a *non sequitur*. The actual holding of that paragraph and necessarily of the opinion and judgment of the Court of Appeals,

was obviously that the proceedings in the Texas Court were not void, even though severance of the joint indictment was itself a material exercise of jurisdiction (*Schaffer v. United States,* 221 F. 2d 17 (CA 5th, 1955)), and that Rule 20 was effective to confer upon the transferee Court jurisdiction to proceed against the Petitioner notwithstanding his nonconsent and protest.

The contrary was squarely held by the late James Alger Fee, when a District Judge, in the case of *United States v. Bishop,* 76 F. Supp. 866 (Dist. Ct. Oregon, 1948). In that case it appeared that the locale of all the crimes charged was in Oregon. Green, one of the defendants, was charged with the actual robbery and Bishop with receiving some of the proceeds. Both had been arrested in Oklahoma but while Bishop had been promptly removed to Oregon, Green was permitted to apply for transfer of the proceedings against him to Oklahoma, under Rule 20, which Judge Fee refused to permit, saying, among other things (p. 868-870):

> "It is also said that Green is adverse to removal, and has requested that the papers in this case be transferred to Oklahoma under Rule 20, Federal Rules of Criminal Procedure, 18 U.S.C.A. following section 687, so that he may be sentenced there. He is said to be anxious to plead guilty to the robbery at Sweet Home, but in Oklahoma, not in Oregon.
>
> "But Bishop is in this District and must be sentenced here. In fairness to him, the participation of all of these people in these transactions must be made plain. It is a cardinal principle of criminal justice that all participants of one crime or series of related criminal actions should be sentenced if possible by the same Judge. Sentencing is not an exact science and therefore the balancing of all in one transaction should at least be on the same scale. This certainly applies to Bishop and

Green, who were both held in Oklahoma, and each of whom wishes to plead guilty. The accessory should not on grounds of public policy be sentenced by a different Judge than the principal."

* * *

P. 868 and 869:

"Here the right of Bishop to have all participants in a transaction face the same Judge is inextricably interwoven with the right of the people of Oregon, who were offended, to have justice done to all in their own court. Article III, Section 2, of the Constitution, protects this right of the individual state by setting up federal trial courts as an integral part of the judicial structure of each, and requires in the public interest that the trial of all crimes take place in the state in which they were committed.

"When the provisions of the Bill of Rights were adopted and amendments thereto, there was conferred upon each defendant a personal right to be indicted, tried and sentenced in the state where the crime was alleged to have been committed. As an additional safeguard, there was created as a right of a defendant the necessity for a trial court in a federal judicial district, whose boundaries might be coextensive with but could not exceed those of the state within which it was erected. Here and here alone had this court power to indict, try and sentence a defendant. The judicial structure was so tied into the personal right of a defendant by these interlocking provisions that one could not be waived without destroying the other.

"The sound public policy laid down as to multiple defendants indicted for one apparently continuous transaction can be carried out by directing the United States Attorney not to countenance or

allow his name to be used in connection with an application for transfer under Rule 20. But the office of the Attorney General is reported to be adamant in insistence that the transfer be carried out."

* * *

P. 870:

"No case has been cited nor has our research disclosed any, since the promulgation of the federal government, where a defendant has been tried or sentenced in one district court upon an indictment returned in another, before the adoption of Rule 20. Yet, if the thesis of the proponents of the rule be true, such trial or sentence could have taken place in any federal district in the country at any time in our history, since the matter was dependent upon the waiver of a personal privilege. No rule was or is necessary if the proposition is correct. The drafters cite and can cite no precedent. We must conclude the jurisdiction of the Court, as well as the personal right of defendant, is involved.

"However, were the rule to be held valid, it certainly does not apply to a case where an indictment joins multiple defendants. Rule 20 provides that a defendant held in a district other than where the indictment was returned may offer to plead guilty, and if the United States Attorneys of the two districts concur, the papers shall be forwarded by the Clerk of the indicting district to the Clerk of the district where the defendant is held 'and the prosecution shall continue in that district.' Obviously the intention is that the whole case shall be transferred. The rule fits a case where there is only one defendant. But where there are several defendants, under the language of the rule itself, the prosecution cannot continue in any district except that where the indictment was returned."

Judge Fee, at about the same time, wrote three other opinions in situations involving Rule 20, which were *United States v. Bink,* 74 F. Supp. 603 (Dist. Ct. Oregon, 1947), *United States v. Schwindt,* 74 F. Supp. 618 (Dist. Ct. Oregon, 1947) and *United States v. Tollett,* 76 F. Supp. 871 (Dist. Ct. Oregon, 1948). In *Bink* it appeared that there was a joint indictment of two defendants for an offense committed in South Dakota, and that one only applied for transfer to Oregon under Rule 20, and even though the opinion uses language that may be broader than was necessary, the Court held that such transfer proceedings, and the proceedings in the Oregon Court, would be absolutely void.

The cases cited by the Court of Appeals as disapproving those decisions of Judge Fee (*Levine v. United States,* 182 F. 2d 556 (CA 8th, 1950) and *United States v. Gallagher,* 183 F. 2d 342 (CA 3rd, 1950)), while critical of the scope of the language used by Judge Fee, were cases involving indictments of single defendants, and do not, in fact, disapprove the holding of the Oregon District Court in multiple defendant cases, and research has disclosed no such case, until the instant decision of the Court of Appeals of the Fifth Circuit.

POINT II

THE MATTER PRESENTED IS WITHIN THE RECOGNIZED EXCEPTION TO THE FINAL JUDGMENT RULE.

The invalidity of the proceedings in the Texas Court would not afford any basis for the reversal of a judgment of conviction of Petitioner, so that even though the Court of Appeals held that the orders of the District Court in Florida were interlocutory and not appealable, it seems apparent that unless reviewed before convic-

tion those orders of the Florida Court will afford no basis for reversal of a judgment of conviction. The situation is analogous to that disclosed in the case of *In re Medley,* 134 U.S. 160 (1890) where in this Court held that a state statute modifying the conditions under which a prisoner was held after conviction of murder was an invalid *ex post facto* law, but said:

> "A question suggested itself, however, to the court which is not a little embarrassing, and which was not presented by counsel in the argument of the case. This consideration arises from the fact that there does not seem to be in the record before us any error in the proceedings of the court on the trial and the verdict of the jury, by which the party was convicted of murder in the first degree."

The failure of the District Court in Florida to treat the Texas proceedings as *coram non judice* and absolutely void, and either to dismiss the indictment of Petitioner or to order the re-arrest of Estes, in and of itself, will not warrant or require the reversal of a judgment of conviction if the trial is otherwise conducted according to the forms of law, a situation which is emphasized by the following observation from the instant opinion of the Court of Appeals:

> "In the development of any testimony the function of the trial court is to apply the traditional standards of admissibility of evidence, right of cross-examination, impeachment, etc. These familiar rules are adequate safeguards to protect appellant from prejudiced or biased testimony of any witness as the facts may be developed."

If the Petitioner does have a constitutional right to require all proceedings against him to be conducted in the Florida Court, the right is lost forever unless these matters are reviewed before judgment, and appropriate measures are taken to protect that right. That right is absolute, and Petitioner does not apply to this Court on the basis of what the Court of Appeals characterized as "hypotheticals."

CONCLUSION

This case involves a novel and important question in the administration of the Federal criminal law which has not been but should be settled by this Court, in a situation which calls for the exercise of this Court's power of supervision, and this petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

JAMES B. MCDONOUGH, JR.
601 Exchange National Bank Building,
Tampa 2, Florida
Attorney for Petitioner

Dated at Tampa, Florida
March 27, 1963

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari have been served by mail upon the office of the United States Attorney, Federal Building, Tampa, Florida, this 27th day of March, 1963, and upon the office of the Solicitor General, Department of Justice, Washington 25, D. C.

JAMES B. MCDONOUGH, JR.

APPENDIX A

OPINION BELOW

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19594

JAMES NORMAN YELOUSHAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 6, 1963)

Before JONES and BELL, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: Appellant and Gene N. Estes were named as co-defendants in an indictment returned by a Grand Jury in Tampa, Florida, and charged with violation of Title 18, United States Code, Sections 2 and 1010, by uttering and publishing false statements in a credit application signed by Estes and his wife in connection with a home improvement loan insured by the Federal Housing Administration.

Estes was arrested in Midland, Texas. He waived his right to trial in the district where the indictment was returned and consented to disposition of the case against him in the district where he was arrested under the provisions of Rule 20, Federal Rules of Criminal Procedure. The United States Attorney for the Southern District of Florida and the United States Attorney for the Western District of Texas approved the transfer. Estes was arraigned, entered a plea of guilty and was sentenced, on February 16, 1962 at El Paso, Texas.

Appellant was arraigned on January 5, 1962 at Tampa, Florida, and he entered a plea of not guilty.

At the time of arraignment appellant asked for and was granted thirty days in which to file motions. He moved separately for a bill of particulars, for the production of documents, to inspect the minutes of the Grand Jury and to require the United States Attorney for the Southern District of Florida to withdraw his consent to the Rule 20 transfer of the proceedings against Estes. These motions were denied by a single order dated February 27, 1962. He moved to dismiss the indictment, and this motion was denied by an order dated February 28, 1962. A further motion to dismiss the indictment, or in the alternative to order the arrest of Estes, was denied by order date March 28, 1962.

The order of February 27, 1962 forms the basis of the first appeal; the order of February 28, 1962, the second appeal; and the order of March 28, 1962, the third. These three appeals were consolidated by order of this Court on May 15, 1962.

The jurisdiction of this Court is limited by Title 18, United States Code, Section 1291, to review of *"final decisions"* of the lower court. The reason for this insistence on finality and the prohibition of piecemeal review is to discourage undue litigation and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.[1]

What constitutes a final decision in a criminal case has been stated in *Parr v. United States,* 351 U.S. 513 (1956), and *Carroll v. United States,* 354 U.S. 394 (1957). In *Parr* the Supreme Court said at page 518:

> " * * * In General, a 'judgment' or decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.' "

> " * * * 'Final judgment in a criminal case means sentence. The sentence is the judgment.' * * * "

The requirement of finality of decisions for appellate jurisdiction was recently underscored by the Supreme Court in *DiBella v. United States,* 369 U.S. 121 (1962). Certiorari was granted to review *DiBella v. United States,* 284 F. 2d 897 (CA 2d 1960), along with *United States v. Koenig,* 290 F. 2d 166 (CA 5th 1961), to resolve a conflict between the circuits.

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[1]Cobbledick v. United States, 309 U. S. 323, 324-326. DiBella v. United States, 369 U. S. 121, 124.

In *DiBella* the trial court had denied a pre-indictment motion to suppress evidence. The Court of Appeals for the Second Circuit held this order appealable. In *Koenig* there was a pre-indictment motion to suppress evidence. This motion was granted and the Government appealed. This court dismissed the appeal for lack of jurisdiction on the ground that the order was not a final judgment. The final decision of the Supreme Court vacated the *DiBella* decision of the Second Circuit and affirmed the *Koenig* decision of this court. The Supreme Court stated at page 131:

> "We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. * * * Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. (They are) . . . 'but a step in the criminal case preliminary to the trial thereof.' *Cogen v. United States*, 278 U.S. 221, 227."

Appellant contends, nevertheless, that this Court has jurisdiction to review all of the orders appealed from even though they are interlocutory because the effect of the order of March 28, 1962, constituted a final decision.

This order denied appellant's motion to rearrest Estes or, in the alternative, to dismiss the indictment. Appellant claims that the attribute of finality is derived from the operation of the order dismissing the indictment and terminating the proceedings as to his co-defendant Estes.

It is clear, however, from the record that the proceedings against Estes were terminated by the District Court for the Western District of Texas when sentence was imposed on February 16, 1962. Therefore, when the matter was brought before the district court in Florida upon motion on March 27, 1962, the question was moot and the court was not in error in treating the motion as an additional ground to dismiss the indictment yet pending against appellant. There was no indictment pending against Estes in any United States District Court and there simply was nothing upon which a warrant of arrest of Estes could be predicated. The order of March 28, 1962 was clearly interlocutory and not appealable.

Appellant then seeks to invoke appellate jurisdiction upon exception to the final judgment rule. In the event the damage of error, unreviewed before the judgment is definitive and complete, is deemed greater than the disruption caused by immediate appeal, then an appeal will lie even though the proceeding and order are clearly interlocutory in nature. This is a very narrow exception. As stated by Justice Frankfurter in *DiBella* at page 126:

> "Despite these statutory exceptions to, and judicial construction of, the requirement of finality, 'the final judgment rule is the dominant rule in federal appellate practice.' * * * Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of criminal law."

Appellant has not demonstrated on this record even a plausible suggestion that this case falls within any of the extremely narrow exceptions to the final judgment rule.[2]

Appellant's only ground for his claim of clear error appears to be that Estes might testify at appellant's forthcoming trial and that such prospective testimony might be cloaked with some kind of immunity since Estes has already been sentenced. This has no merit. This is, in essence, nothing more than an attack on the credibility of a prospective witness, and the weight and sufficiency of his prospective testimony, both of which, if ever occurring, are most exclusively and absolutely staked out for jurors. In the development of any testimony the function of the trial court is to apply the traditional standards of admissibility of evidence, right of cross-examination, impeachment, etc. These familiar rules are adequate safeguards to protect appellant from prejudiced or biased testimony of any witness as the facts may be developed. We neither anticipate prejudice nor do we reject the possibility of its occurrence. Such is not our function. Without belaboring these hypotheticals further we comment in this connection merely to illustrate again the wisdom of restriction on premature appeals in criminal cases.

Finally, appellant complains that the transfer of the proceedings as to Estes to the Western District of Texas was not a proper application of Rule 20 (FRCP), because appellant, as a co-defendant, did not consent to the transfer. Rule 20 does not expressly require the consent of co-defendants in order to effectuate a transfer. The authority cited by appellant for the proposition

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[2]DiBella v. United States, 369 U. S. 121, 124-127 and Collins v. Miller, 252 U. S. 364, 370.

that the rule is not applicable in any multi-defendant case[3] has not been followed and has, in fact, aroused criticism and disapproval.[4] We cannot and we do not reach this question on this appeal for we hold that the showing here does not vest appellate jurisdiction in this Court.

Summarizing, it is plain that the order of February 28, 1962 denying appellant's motion relative to the Rule 20 transfer was not a final order, but interlocutory and therefore not appealable. Further, appellant has not demonstrated that the transfer of the proceedings against Estes brings this case within the exception, previously noted, to the final decision rule. The appeal is accordingly

DISMISSED.

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[3]United States v. Bink, 74 F. Supp. 603 (Dist. Ct., Oregon, 1947); United States v. Schwindt, 74 F. Supp. 618 (Dist. Ct., Oregon, Oct. 15, 1947); United States v. Bishop, 76 F. Supp. 866 (Dist. Ct., Oregon, 1948); United States v. Tollett, 76 F. Supp. 871 (Dist. Ct., Oregon, 1948).

[4]Levine v. United States, 182 F. 2d 556 (CA 8th, 1950); United States v. Gallagher, 183 F. 2d 342 (CA 3rd, 1950); Barron & Holtzoff, Federal Practice and Procedure, Vol. 4, Rules Edition, § 2081, page 144, 146.

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APPENDIX B

JUDGMENT

UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,594

D. C. Docket No. 7943-T-Cr.
JAMES NORMAN YELOUSHAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before JONES and BELL, Circuit Judges, and CARSWELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed.

"Per Carswell, District Judge"
2/6/63

APPENDIX C

ORDER DENYING REHEARING

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19594

JAMES NORMAN YELOUSHAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 1, 1963)

ON PETITION FOR REHEARING

Before JONES and BELL, Circuit Judges and CARSWELL, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-styled and numbered cause be and the same is hereby

DENIED.

APPENDIX D

ORDER DENYING STAY

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 19594

JAMES NORMAN YELOUSHAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before JONES and BELL, Circuit Judges and CARSWELL, District Judge.

BY THE COURT:

IT IS ORDERED that the Motion of Appellant for an Order or Direction from this Court Staying Further Proceedings in the District Court until the Mandate of this Court has been Lodged Therein be, and the same is hereby

DENIED.

(Original Filed — March 1, 1963)

APPENDIX E

INDICTMENT

United States District Court

SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 7943 T. Cr.
(18 USC 2 and 1010)

UNITED STATES OF AMERICA
Petitioner,

vs.

GENE N. ESTES and
JAMES NORMAN YELOUSHAN
Respondent.

The Grand Jury charges:

COUNT ONE

That on or about April 25, 1960, in Hillsborough County, in the Southern District of Florida,

GENE N. ESTES and
JAMES NORMAN YELOUSHAN,

hereinafter called the defendants, for the purpose of obtaining a loan and advance of credit from the First Federal Savings and Loan Association of Tampa, Florida, with the intent that said loan and advance of credit would be offered to and accepted by the Federal Housing Administration for insurance, did utter and

publish to said association a false statement, which they, and each of them, knew to be false, that is to say: At said time and place the said defendants uttered and published to said association a credit application for a property improvement loan to be insured under the terms of Title I of the National Housing Act, signed by Gene N. Estes and LaVera N. Estes, as applicants, dated April 25, 1960, in which it was stated that the property to be improved was located at 12213 N. Armenia, in Tampa, Florida, and was owned by the applicants, and the improvements to be made on said property consisted of a new roof, painting inside and out, making a bedroom addition, building a new dock, and resanding the beach, which statement was false for, as the defendants then and there well knew, the proceeds of said loan were not intended to be used to make the aforesaid improvements, but were to be used by the said applicants as a down payment for the purchase of said property; in violation of Sections 2 and 1010, Title 18, United States Code.

A TRUE BILL

Foreman

EDWARD F. BOARDMAN
United States Attorney

By ---

Edith House

Assistant United States Attorney

APPENDIX F

[Statutes referred to in the indictment]

18 United States Code, Section 1010:

"§ 1010. Federal Housing Administration transactions

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751."

18 United States Code, Section 2:

"§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717."

APPENDIX G

JOINT TELEGRAM TO:

"HON. R. E. THOMASON
United States
District Judge
El Paso, Texas

LAWRENCE L. FULLER, ESQ.
First National Bank Bldg.
Midland, Texas

On November 21, 1961, Gene N. Estes and James Norman Yeloushan were jointly indicted under Sections 2 and 1010 United States Code for an offense alleged to have been committed in Southern District of Florida. Estes was arrested in Western District of Texas and Yeloushan in Southern District of Florida. Yeloushan appears to be charged only by virtue of Section 2. Both defendants were arraigned here January 5, 1962, at which time Estes did not appear but Yeloushan appeared and pleaded not guilty.

On January 8, 1962, Estes signed a consent to transfer for plea and sentence pursuant to Rule 20 Federal Rules Criminal Procedure. On January 25, 1962, immediately upon discovery of that fact the undersigned appeared before and was authorized by District Judge Barker to file motion to require United States Attorney here to withdraw his consent to such transfer. On February 1, 1962, formal motion for that relief was filed and has been assigned by District Judge Lieb for hearing before him on February 26, 1962. The motion is not only addressed to the discretion of the District Court here but it also raises the question of the effectiveness of Rule 20 to transfer jurisdiction under such circumstances and its constitutional validity if so applied. Defendant Yeloushan by and through the undersigned respectfully moves your honorable court as a matter of comity to defer acceptance of plea by defendant Estes until the United States District Court here has passed upon that motion.

This telegram is joint to Lawrence L. Fuller, Esq., attorney for Estes at Midland, Texas. Advice was only received at 6:00 P. M. yesterday by telephone from office of United States Attorney at El Paso that Estes intended to appear and plead guilty on Friday, February 16, 1962. Time is also requested to permit the preparation and filing of formal motion for this relief.

JAMES B. MCDONOUGH, JR.
Attorney for defendant
Yeloushan
308 Tampa Street
Tampa, Florida."

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 953

JAMES NORMAN YELOUSHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 313 F. 2d 303.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 6, 1963. A petition for rehearing (Pet. App. C) was denied on March 1, 1963. The petition for a writ of certiorari was filed on March 28, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

The district court denied petitioner's motions to require the United States Attorney for the Southern District of Florida to withdraw his consent to the Rule 20 transfer of the proceedings against petitioner's codefendant, or in the alternative to order the arrest of petitioner's codefendant. The question is whether these orders of the district court were appealable as final decisions within the meaning of 28 U.S.C. 1291.

STATEMENT

On November 21, 1961, an indictment was returned in the United States District Court for the Southern District of Florida charging petitioner and Gene N. Estes with violating 18 U.S.C. 1010 by uttering and publishing false statements in an application for a loan insured by the Federal Housing Administration (R. 1–2).[1] Petitioner was arrested in Florida; Estes

[1] According to the petitioner, Estes, a native of Midland, Texas, who came to Tampa, Florida, with his wife and four children in 1960, wished to purchase a house from petitioner but did not have the $3,000 in cash required for the down payment. It is petitioner's contention that Estes told him that he had the $3,000 but that he would prefer to use it to make some improvements on the house. Estes' version of the transaction is that petitioner suggested that he obtain the money required for the down payment through an FHA insured home improvement loan. Estes made application for a home improvement loan at the First Federal Savings and Loan Association in Tampa, specifying in detail the improvements that were to be made (R. 75). Instead of using the money as he had indicated, Estes gave petitioner the proceeds of the loan as the down payment for the house (R. 38). In December of 1960, Estes defaulted on the loan and returned to Midland, Texas.

in Texas. Estes waived his right to trial in the district where the indictment was returned and consented to disposition of the case against him in the district where he was arrested under the provisions of Rule 20, F.R. Crim. P. (R. 3, 89–90). The United States Attorney for the Southern District of Florida and the United States Attorney for the Western District of Texas approved the transfer. Estes was arraigned, entered a plea of guilty and was sentenced on February 16, 1962, at El Paso, Texas (R. 97–117). Petitioner was arraigned on January 5, 1962, at Tampa, where he entered a plea of not guilty (R. 85–88). Later petitioner filed successive pre-trial motions requesting the district court to require the United States Attorney for the Southern District of Florida to withdraw his consent to the Rule 20 transfer, to dismiss the indictment against petitioner, or to order the re-arrest of Estes (R. 20, 22, 64).

The district court denied the motions, and petitioner appealed each denial. The appeals were consolidated by the court of appeals, which then dismissed them on the ground that the orders were not "final decisions" within the meaning of 28 U.S.C. 1291 (R. 161–167).

ARGUMENT

The orders of the district court from which petitioner has appealed were not appealable since the jurisdiction of the court of appeals is limited by 28 U.S.C. 1291 to a review of "final decisions" and the interlocutory orders involved in this case do not fall within any exception to this "final decision" rule. *DiBella* v. *United States,* 369 U.S. 121; *Carroll* v.

United States, 354 U.S. 394; *Cogan* v. *United States*, 278 U.S. 221.

What constitutes a final decision is well settled. In *Parr* v. *United States*, 351 U.S. 513, 518, this Court stated, "Final judgment in a criminal case means sentence." Petitioner's case has not yet gone to trial. Obviously there has been no "final decision."

Petitioner argues, however, that the damage caused by failure to review the district court's orders before final judgment is so great as to offset the disruption caused by an immediate appeal and that his case is, therefore, to be treated as an exception to the "final decision" rule. This contention has no substance. Petitioner's position is the same whether Estes pleaded guilty in Florida or whether he pleaded guilty in Texas. Clearly if the former were the case, petitioner could not claim that the denial of his motions for a dismissal was appealable before final judgment. The situation is not changed by Estes' presence in Texas rather than Florida.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

APRIL 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963